APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

CURTIS LEE JOHNSON,

Petitioner,

vs.

JAMES SPALDING, DR. ROBERT JONES, THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CURTIS LEE JOHNSON,
Petitioner-Appellant,

v.

JAMES SPALDING, DR. ROBERT JONES, THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON,
Respondents-Appellees.

NO. 81-3205

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted Jan. 5, 1982.

Decided Feb. 18. 1982.

The United States District Court for the Eastern District of Washington, Justin L. Quackenbush, J., 510 F.Supp. 164, denied habeas corpus relief, and petitioner appealed. The Court of Appeals, Kilkenny, Circuit Judge, held that there was no real possibility that jury was actually misled or that petitioner was in any way prejudiced by alleged errors he raised on appeal.

Affirmed.

Habeas Corpus 25.1(4)

Petitioner, a Washington state prisoner who was convicted of first-degree murder, had

fair trial and there was no real possibility that jury was actually misled or that he was in any way prejudiced by alleged errors, and thus petitioner, who argued that alibi instruction shifted state's burden of persuasion to him, that instruction on reasonable doubt overstated uncertainty required for reasonable doubt, and that district court made several erroneous evidentiary rulings that violated his due process rights, was not entitled to habeas corpus relief. 28 U.S.C.A. § 2254; U.S.C.A.Const. Amend. 5.

John A. Strait, Tacoma, Wash. for petitioner-appellant.

Mike Lynch, Asst. Atty. Gen., Olympia, Wash., for respondents-appellees.

Appeal from the United States District Court Eastern District of Washington.

Before KILKENNY, ANDERSON and ALARCON, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant, a Washington state prisoner,

convicted of first degree murder, convicted of first degree murder, sought habeas corpus relief under 28 U.S.C. § 2254. In an exceptionally well written and exhaustive order, the district court denied the petition. Johnson v. Spalding, 510 F.Supp. 164 (ED Wash. 1981).

Here, as in the district court, the appellant challenges the validity of the state court conviction on the following grounds:

(1) that the alibi instruction shifted to him the state's burden of persuasion;

(2) that the instruction on reasonable doubt overstated the uncertainty required for a reasonable doubt;

(3) that an adverse missing witness inference argued by the prosecution prevented him from having a fair trial;

(4) that the admission of prior trial testimony of an unavailable state's witness violated his right to confrontation;

(5) that a limitation upon the scope of impeachment testimony violated his right to confrontation and cross-examination;

(6) that the admission of portions of a letter to show appellant's hostility to the prosecutor biased the jury against him, and

(7) that his right to effective assistance of counsel was denied.

Additionally, appellant claims that the district court order is based upon erroneous case analysis and that it made several erroneous evidentiary rulings that individually and collectively violate the appellant's due process rights.

Despite the arguments and case citations in appellant's 46-page opening brief, with appendix, and his 9-page reply brief, our review of the complete record before us, including that of the state court, convinces us that the district court correctly interpreted and properly applied the law to the record. Beyond question, the appellant had a fair trial and we see no real possibility that the jury was actually misled or that appellant was in any way prejudiced by the alleged errors raised on this appeal. Appellant's substantial

rights were in no way affected. Because appellant's assignments of error are to all intents and purposes identical with those raised in the district court, and by reason of our review of the record, we have no hesitancy in affirming that court's order for the reasons stated in its order, supra.

IT IS SO ORDERED.

CURTIS LEE JOHNSON, Petitioner,

v.

JAMES SPAULDING, Respondent.

No. C-80-479.

United States District Court,

E. D. Washington.

March 19, 1981.

Petitioner sought writ of habeas corpus. The District Court, Quackenbush, J., held that: (1) alibi instruction given at petitioner's state murder prosecution did not unconstitutionally remove prosecution's burden to prove evidence and persuade jury as to essential elements of the crime; (2) giving of instruction concerning reasonable doubt did not raise issue of constitutional dimensions; (3) cumulative allegations of nonconstitutional "error" could not be considered; (4) petitioner was not denied his right to confront witnesses; and (5) petitioner failed to establish that he was denied his right to the effective assistance of counsel.

Petition denied.

John A. Strait, Criminal Appellate Clinic, University of Puget Sound School of Law, Tacoma, Wash., for petitioner Curtis Lee Johnson.

Michael P. Lynch, Asst. Atty. Gen., Olympia Wash., for respondent Superintendent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

QUACKENBUSH, District Judge.

Petitioner seeks a writ of habeas corpus. He is confined as a result of a conviction for first degree murder. He challenges that confinement alleging: (1) an alibi instruction shifted the state's burden of persuasion onto him; (2) the reasonable doubt instruction overstated the uncertainty required for a reasonable doubt; (3) an adverse missing witness inference prejudiced a fair trial; (4) the admission of prior trial testimony of an unavailable state's witness violated the right to confrontation; (5) a limitation upon the scope of impeachment testimony violated the right to confrontation and cross-examiantion;

(6) the admission of a letter to show hostility to the prosecutor biased the jury; and (7) his right to effective assistance of counsel was denied.

Petitioner was charged in Walla Walla County Washington Superior Court with the first degree murder on January 7, 1976 of a prisoner inmate. At trial Petitioner testifed and produced witnesses to support his alibi defense. A deadlocked jury and extensive media coverage necessitated a second trial with venue in Snohomish County. The second jury found Petitioner guilty. Petitioner returned to Walla Walla County for pronouncement of a life imprisonment sentence.

Division III of the State of Washington Court of Appeals reviewed the same errors as alleged in this Court, affirming the conviction. Its opinion is published in part at State v. Johnson, 19 Wash.App. 200, 574 P.2d 741 (1978). The Washington Supreme Court refused a discretionary review. Subsequently,

Petitioner instituted this collateral attack upon his confinement as allegedly imposed contrary to the United States Constitution.

[1] There was some initial concern with the propriety of our jurisdiction to entertain Petitioner's application for a writ. Jurisdiction is limited by 28 U.S.C. §2241(d) which permits an application to be filed "in the district court for the district wherein such person is in custody or ... the district within which the State Court was held which convicted and sentenced" the petitioner. Petitioner filed his application for the writ while in Shelton State Reformatory within the territorial reach of the federal court for the western district of Washington,[1] thus our

1. Counsel informed the Court that Petitioner was only temporarily at Shelton. His belongings were in the penitentiary at Walla Walla, in this Court's geographic jurisdiction. Petitioner was then moved out of the state and subsequently returned to Walla Walla at the time of argument in this Court.

concern for jurisdiction under the "in custody" requirement. However, the jurisdictional basis under the criteria of this court's jurisdiction over the proceedings of the court "which convicted and sentenced" is considerably stronger.

Following his trial in the County of Snohomish, Petitioner and the full record of his case were returned to the control of Walla Walla County Superior Court within this district. It appears that the ministerial act of entering the judgment of conviction occurred in Walla Walla County Cause No. 66747. Post trial motions, sentencing, and the commitment occurred in Walla Walla County. We understand that a Washington conviction may mean a "formal finding or declaration of guilt--as in a judgment and sentence". State ex rel. Brown v. Superior Court, 79 Wash. 570, 140 P. 555 (1914). These facts would satisfy the "convicted and sentence" language of the statute, §2241(d). Therefore, this Court is satisfied

that it has jurisdiction.

[2] The Court is also satisfied that exhaustion doctrine would allow Petitioner to proceed in this Court, notwithstanding a remedy available to petitioner in the State Court through the vehicle of a personal restraint petitioner. The Washington Rules of Appelate Procedure (RAP) establish the personal restraint petitioner as the only procedure for post-conviction relief originating in the appellate courts. RAP 16.3. The issues raised by the habeas corpus petition were previously and "fairly presented" to the Division III Court of Appeals, similarly constituted, to which the state personal restraint petition would be directed. RAP 16.3(c), 16.8(b). The decision of that court is subject to discretionary review by the State Supreme Court "on the terms and in the manner" as governed the petition for review of the direct appeal. RAP 16.14(c). We perceive that any effort to exhaust state remedies clearly would be

futile and that is not required. Blackledge v. Perry, 417 U.S. 21, 24, 94 S.Ct. 2098, 2100, 40 L.Ed.2d 628 (1974). We proceed seriatim to treat the allegations that Peitioner "is in custody in violation of the Constitution of the United States. 28 U.S.C. § 2254(a).

[3] The Court recognizes that the Constitution must not be lightly construed "so as to intrude upon the administration of justice by the individual states" and, that "among other things it is normally 'within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Patterson v. New York, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977). However, if the alibi

instruction[2] required the defendant to produce evidence and convince the jury as to his innocence of the elements of the crime, the instruction would offend the presumption of innocence[3] "ranked as fundamental". This Court would intervene in such a case to overturn the

2. "A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.
When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.
After both the State and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, if not, you should convict."

3. The presumption of innocence is a shorthand description of the right of the accused to "remain inactive and secure" until the prosecution has taken up its burden to produce evidence and to persuade or convince the jury beyong a reasonable doubt. Taylor v. Kentucky 436 U.S. 478, 483 n. 12, 98 S.Ct. 1930, 1934 n. 12, 56 L.Ed. 2d 468 (1978).

state court's verdict. Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

[4] Petitioner argues that the alibi instruction given at trial removed the prosecution's burden to produce evidence and persuade the jury as to the essential elements of crime and placed that requirement upon him. To assess this contention, the Court must look to all of the instructions and not to an isolated word or sentence. Cupp v. Naughten, supra, 146-47, 94 S.Ct. at 400.

[5] An alibi defense is the presentation of evidence in an attempt to refute the state's evidence concerning an essential element--the defendant's presence. The challenged instruction states the law of the "defense of alibi" as rule affecting the evidentiary and procedural order of proof. The instruction does not compel the jury to first believe the state's evidence. It does not operate in effect to tell the jury "before you can acquit

the defendant by reason of his defense of alibi, you must find that he has established it (by some evidentiary measure)", Stump v. Bennett, 398 F.2d 111, 119 n.6 (8th Cir. 1968)(en banc).

The contested second paragraph of the instruction begins with the placing of burden of production and persuasion upon the state. The relevant language of the instruction is: "when the state makes out such a case as would sustain a verdict of guilty". The instruction then describes the defendant's presentation as to his theory of the case to refute the state's case. However, the language does not requre the jury to believe the prosecutor's theory until it is satisfied with the defendant's theory. The continuing notion that the prosecution must prove the elements is not interrupted by language of incumbency, requirement, or similar compulsion such that defendant's failure to do as required accrues to the prosecution's benefit. The pertinent language is as follows: "and

the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned". What verges on a burden in this language draws the jurors' attention to the question of whether defendant produced sufficient evidence to put the particularfact of his presence in issue but defendant need not to anything--neither produce nor persuade the mind of the jury. Admittedly, the instruction may create confusion or ambiguity but that is dispelled immediately in the closing paragraph.

On balance, the instruction and the charge as a whole made the jurors' duty clear. The sum of the instruction is that, even if the jury should determine that the defendant presented insufficient evidence of alibi (the alibi evidence in this case was substantial) or should disbelieve the evidence, the jury must weigh all the evidence submitted and should acquit if there is a reasonable doubt of guilt. Furthermore, the charge requires

the state, not the defendant, to meet the resonable doubt standard to convince the jurors of the defendant's presence and guilt of the crime. The Court Concludes that the alibi instruction by its language neither shifts the burden of proof nor negates the explicit presumption of innocence charged by Instruction No. 11. The giving of the instruction did not offend the Constitution.[4]

4. Petitioner cites the case of Kubicek v. May, No. 438-73 C2 (W.D.Wa.1973) (unreported habeas corpus case companion to State v. Kubicek, 81 Wash.2d 497, 502 P.2d 1190; petition granted on grounds that alibi instruction was fundamentally unfair) as support for distinquishing between the alibi instruction in State v. Adams, 81 Wash.2d 468, 503 P.2d 111 (1972) which Petitioner accepts as not containing burden shifting language, and the alibi instruction in this case. However, the instruction in Kubicek's case contained language of "incumbenby". It placed the burden of proof upon the accused to prove something and further required defendant to satisfy the jury. On the other hand, the instruction in this case is identical in operational effect to the State v. Adams type instruction. The only linquistic difference is in use of "to make out" in Adams and the use of "to prove" in this instant instruction. This type instruction was challenged in Poole v. State, 551 F.2d 683 (5th Cir.1977) with the panel holding the instruction did not deny due process, affirming the denial of the writ. Furthermore, a panel of this circuit in Adams v. Raines, No. 74-1848

[6,7] Petitioner alleges that the giving of Instruction 14[5] equated reasonable doubt with substantial doubt thereby overstating the degree of uncertainty required for acquittal. Petitioner provides no authority to support the contention that giving this instruction violates the Constitution. Petitioner's support lies mainly in direct appeal cases, not collateral attacks on state court convictions. In habeas proceedings Petitioner must go further than showing error or even plaine error.

(Dec. 3 1974)(unpublished but argued by the parties) held the instruction was not constitutionally infirm. In United States v. Robinson 602 F.2d 760 (6th Cir. 1979) the Court held on direct appeal that reversal for the giving of a similar type instruction was not required; burden of proof not placed upon defendant.

5. Instruction 14 in pertinent part reads as follows: The expression "reasonable doubt" means in law just what the words imply--a doubt founded on some good reason. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fairminded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

He must show plain constitutional error which prejudiced his fundamental right to a fair trial. See, Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). The giving of this instruction does not raise an issue of constitutional dimensions.

[8] As stated above, an isolated word or sentence in an instruction must not control the Court's decision; rather, the Court must look to the whole charge. A reasonable doubt instruction may stand as a whole even if one part of the instruction is misleading. Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954). In this instance the language of the instruction, viewed in its entirety did not equate reasonable with substantial doubt. United States v. Loman, 551 F.2d 164, 167 (7th Cir. 1976) cert. denied 433 U.S. 912, 97 S.Ct. 2982, 53 L.Ed.2d 1097 (1977), citing United States v. Lawson, 507 F.2d 433 (7th Cir. 1974)(definition of reasonable coubt as "a doubt that is based on reason

and must be substantial rather than speculative" is based on acceptable authority; Id., 440-41). See also, Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 36 L.Ed.2d 468 (1978) (apparently did not find the equation of reasonable doubt with substantial doubt to be offensive).

This instruction, unlike the instruction in Dunn v. Perrin, 570 F.2d 21, 23-4 (1st Cir. 1978), the sole habeas case relied upon by Petitioner, clearly defines reasonable doubt in the context of the burden upon the state to prove every material fact "beyond a reasonable doubt". The total effect of the instruction is that the jury was made to understand that they must feel sure of defendant's guilt and that the onus was on the prosecution and not the defense.

[9] Petitioner, in connection with the two challenged instructions and other asserted evidentiary errors, argues that we should gather any non-constitutional "errors" to-

gether to find that two or more of them constituted the denial of a fundamentally fair trial. This argument, however, is unacceptable. This Court does not have the reviewing authority of an appellate court. Only constitutional error is cognizable here. Donnelly v. DeChristofor, 416 U.S. 637, 642-43, 94 S. Ct. 1868, 1871, 40 L.Ed.2d. 431 (1974); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976); Wainwright v. Sykes, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977). An allegation of error not of constitutional proportions is, for habeas corpus purposes, foreclosed from further consideration except as it constitutes a fact of trial connected to the determination of prejudice after a determined constitutional error. [10] Each allegation of instructional error is tested in the context of the entire charge. State evidentiary rulings are not cognizable unless they involve a "federally significant external event." Crisafi v. Oliver, 396 F.

2d 167 (1968). Certainly, trial errors which infringe upon a specific constitutional protection or oare themselves so prejudicial as to amount to denial of due process, present a justiciable federal issue in a habeas proceeding. Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979). But this Court is without authority to accept Petitioner's invitation to consider cumulative allegations of "error". 28 U.S.C. § 2254(a), and therefore declines it. See, Hammond v. United States, 356 F.2d 931 (9th Cir. 1966)(any number of "almost errors", if not "errors" cannot constitute error; on direct review refusal to stack.)

[11,12] Petitioner next alleges a series of erroneous evidentiary rulings. First, he contends that permitting the prosection's missing witness inference at closing argument rendered the trial fundamentally unfair. The trial judge in advance, over counsel's objection, ruled the adverse inference proper. Defense counsel had an opportunity to rebut

the inference at argument by explaining the absence of the witness--Leo Larsen. However, comment about the failure of the defense to call a witness, even though he is present in court, is not constitutional error. See, U.S. v. Welp, 446 F.2d 867 (9th Cir. 1971). The issue rises to the level of fundamental, however, where the inference is phrased to call attention to the defendant's own failure to testify. United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980). Obviously, the statement of the prosecutor cannot be construed as comment on Petitioner's failure to testify. Petitioner testified. Nor did the statement alter the burden of proof. See United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976).

[13,14] Next, Petitioner alleges that the prosecution was permitted to read Lopez Bible's testimony from the first trial into evidence at the second trial. RP 215-20. He claims this denied his right to confronta-

tion. Lopez Bible, at the time of the second trial, was at an undetermined location in California which made his unavilable without fault of the state. His prior testimony was given under circumstances which provided substantial compliance with the purposes behind the confrontation requirement. See, California v. Green, 399 U.S. 149, 165--66, 90 S.Ct. 1930, 1938--39, 26 L.Ed.2d 489 (1970); Mancusi v. Stubbs, 408 U.S. 204, 215, 92 S.Ct. 2308, 2314, 33 L.Ed.2d 293 (1972). Petitioner had an effective opportunity to confront the witness at the first trial and his Sixth Amendment rights were not deprived by the admitted testimony. Moreover, assuming a Sixth Amendment problem, Bible's testimony, dealing as it did with the transportation of the victim's body from one location to another is of such dubious relevancy that its admission was not prejudicial.

[15-17] Petitioner claims that the restrictions imposed upon the scope of cross-

examination and impeachment of state's witness Bruce Lloyd violated his Sixth Amendment rights. However, the State Court of Appeals found, and the record substantiates their finding, that the facts sought to be introduced about the parole resinstatement of Bruce Lloyd (motive for testifying) and the facts of a prior inconsistent statement of this witness, offered through the impeachment testimony of defense witness Loretta McLaughlin--did come before the jury. RP 242-243; 367-69; 445-48; 454-56; 535-57. The relevant factors concerning Lloyd's motives and his prior inconsistent statements were revealed during the course of the trial. The test as to whether a trial court's ruling violated the Sixth Amendment is "whether the jury had in its possession sufficient information to appraise the biases and motivation of the witness." U.S. v. Bleckner, 501 F.2d 382 (9th. Cir. 1979). The Court admitted sufficient information. Beyond that the Court has broad discretion

concerning the extent of cross-examination. See, e.g., Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir. 1977), cert. denied, 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed.2d 392 (1978). The confrontation clause applies to the essentials of cross-examination not to all the details of its implementation. In this case the substance of Petitioner's Sixth Amendment right was not violated.

[18] Petitioner also contends that the Trial Court's allowing into evidence a portion of a letter sent to the prosecutor, RP--561, biased the jury. But, this contention raises no "federally significant external event"; it implicates no specific guarantee or fundamental right. This evidentiary ruling is not cognizable in a habeas corpus action. Oliphant v. Koehler, 594 F.2d 547, 555 (6th Cir. 1979).

[19] Lastly, Petitioner complains that he was denied his Sixth Amendment right to the assistance of effective counsel. His

claim of ineffective assistance is founded upon the specific assertions that (1) defense counsel(s) failed to know the current status of the alibi instruction law and (2) permitted defense witnesses to appear in prison clothes during a trial where credibility was crucial.

The standard for evaluating this claim of ineffective assistance is set forth in the en banc decision in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793. The circuit held that persons accused of crime must be afforded reasonably competent and effective representation but, where the claim of ineffective assistance if founded upon specific acts or omissions of defense counsel at trial, the accused must establish that counsel's errors prejudiced the defense. Id., 1338, 1341. Applying this standard to the alleged errors convinces the Court that Petitioner was competently represented.

The Supreme Court of Washington in State

v. Adams, supra, stated that the alibi instruction substantially as given in this case was the "approved and accepted" formulation but advised against giving any alibi instruction. Id., 478, 503 P.2d 111. As best as may be determined the instruction was selected by the court, although without noticeable objection of counsel. However, this Court found above that the giving of the instruction did not render the trial fundamentally unfair. In the circumstances of a case where alibi is the theory of defense supported by substantial alibi testimony, it may be tactically sound judgment to request an alibi instruction to assist the jury. The failure to object to this instruction neither indicates a failure to understand the law nor prejudices the defense.

The particular due process right implicated by an appearance at trial in prison issue clothes is the presumption of innocence. Thus, the Fourteenth Amendment protects

against the State compelling an accused to stand trial while dressed in prison clothes. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In this instance, defendant's witnesses, not defendant, appeared in prison clothes. But with or without prison clothes, there was never a question in the jury's mind that these witnesses were inmates of the Washington State Penitentiary. Petitioner makes no allegation that the state compelled their appearance in prison clothes but, had it done so, we would be at a loss to find what prejudice resulted. The tactical decision to present witnesses in prison clothing did not prejudice the defense.

In conclusion, the Court holds that the fundamental rights of due process secured by the Fourteenth Amendment were substantially afforded at trial. The Court is, therefore without grounds upon which to grant the Writ of Habeas Corpus. Consequently, the Petition is DENIED.

IT IS SO ORDERED.

[No. 2139-3. Division Three. January 31, 1978.]

THE STATE OF WASHINGTON, *Respondent*, v. CURTIS LEE JOHNSON, *Appellant*.

[1] **Criminal Law — Alibi — Burden of Proof — In General.** The prosecution's ultimate burden of proving beyond a reasonable doubt that an accused committed the charged crime is not reduced by a defendant's assertion of an alibi.

[2] **Criminal Law — Alibi — Burden of Proof — Instructions.** Although it is error to instruct that alibi is a "defense" and that the defendant has the burden of proving an alibi, such an instruction does not constitute reversible error unless it results in prejudice to the defendant.

Nature of Action: Prosecution for first-degree murder of an inmate at the state penitentiary.

Superior Court: The Superior Court for Walla Walla County, No. 66747, Edward M. Nollmeyer, J. Pro Tem., on October 15, 1976, entered a judgment of guilty.

Court of Appeals: Holding that the giving of an alibi instruction was not reversible error, the court *affirms* the judgment.

John A. Strait, for appellant.

Arthur R. Eggers, Prosecuting Attorney, and *Jerry A. Votendahl, Special Deputy*, for respondent.

McINTURFF, J.—Curtis Lee Johnson appeals from a first-degree murder conviction arising out of a stabbing in a breezeway at the state penitentiary. His defense was an alibi—that he was in the prison cafeteria at the time of the incident.

Mr. Johnson presents nine assignments of error, but his principle contentions concern the advisability of giving an alibi instruction. The court instructed the jury:

> A defense interposed by the defendant in this case is an alibi; that is, the defendant was at another place at the identical time the crime was committed.

When the State makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon said defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.

After both the State and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, if not, you should convict.

Mr. Johnson attacks the instruction on three fronts: (1) Preexisting case law forbids giving an alibi instruction; (2) the instruction does not define the applicable standard of proof required by the defendant to sustain his defense; and (3) it unconstitutionally shifts to him the burden of proving the identity of the killer—an element of the crime.

Slightly different alibi instructions have withstood some of the same attacks in *State v. Kubicek*, 81 Wn.2d 497, 502 P.2d 1190 (1972), and *State v. Adams*, 81 Wn.2d 468, 503 P.2d 111 (1972). In those cases the court concluded that an alibi instruction, whether requested by the State or the defendant,[1] should not in the future be included in the charge to the jury unless mandated by the legislature. Despite its conclusions, the court found the giving of the instructions in both *Kubicek*[2] and *Adams*[3] was not reversible error.

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[1]It is not clear whether the instruction was requested by the State, Mr. Johnson or the court. In affidavits filed for this appeal Mr. Johnson's trial counsel states the instruction was requested at both of Mr. Johnson's trials by the State. His first trial resulted in a mistrial. The court reporter in another affidavit said he typed the instruction at the request of the trial judge. We note only defense counsel referred to the instruction during closing argument.

[2]In *Kubicek* the jury was instructed:

"You are instructed that a defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at an identical time the crime was committed, if committed at all. *When the State makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, it is incumbent upon him to go forward with the evidence to sustain his defense of*

In *Adams* the court said the alibi instruction did not violate the defendant's constitutional rights. That court said at page 475:

> We find in this instruction no denial or contravention of such rights. It is a firm and long-established principle in this jurisdiction that an instruction on alibi may be given if supported by the evidence. . . . The instruction now before us appears to have been taken virtually verbatim from *State v. Rosi*, 120 Wash. 514, 515, 208 P. 15 (1922), where it was explicitly approved despite even a wider challenge than it is subjected to now. In that case, this same instruction was sustained on the basis that, by its very language, it did not remove from the state nor reduce in any degree its burden of establishing each element of the crime beyond a reasonable doubt nor subvert the presumption of innocence.

The court then adhered to its decision in *Kubicek*.

Nonetheless, Mr. Johnson has seized upon recent decisions of both the United States and state supreme courts as requiring a result inconsistent with *Adams* and *Kubicek*. Citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508,

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alibi to your satisfaction. It is not incumbent upon him to prove alibi beyond a reasonable doubt; and when the proof is all in, both that given by the State and for the defendant, then the primary question is (the whole evidence being considered) is the defendant guilty beyond a reasonable doubt, the law being that, if, after you have considered all the evidence as well as that touching the alibi as the evidence introduced by the State, you have a reasonable doubt of the guilt of the accused, you should acquit; if you have not, you should convict." (Italics ours.) *State v. Kubicek*, *supra* at 501.

[3]In *Adams* the jury was instructed:

"A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed, if committed at all.

"*When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence, the burden is upon such defendant to make out his defense as to an alibi, but it is not incumbent upon him to prove an alibi beyond a reasonable doubt.* When the proof is all in, both that given by the state and for the defendant, then the primary question is, the whole of the evidence being considered, whether such defendant is guilty beyond a reasonable doubt. The law is that if you have a reasonable doubt of the guilt of the accused, after having considered all the evidence, you should acquit; but if, after considering all the evidence, you do not have a reasonable doubt of the guilt of the accused, you should convict." (Italics ours.) *State v. Adams*, *supra* at 473.

95 S. Ct. 1881 (1965), *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977), and *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976), Mr. Johnson essentially asks that we reexamine *Adams* and *Kubicek* insofar as they hold that an alibi instruction does not unconstitutionally shift to the defendant the burden of proving an element of the offense with which he is charged.

Primary reliance is placed upon *Mullaney* where the court held that a Maine law, requiring the defendant to establish by a preponderance of the evidence that he acted in heat of passion on some provocation in order to reduce a charge of murder to manslaughter, was violative of due process; that, instead, due process "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation . . ." *Mullaney v. Wilbur*, *supra* at 704. There the jury was instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied, resulting in a conviction of murder unless defendant proved by a preponderance that he acted in the heat of passion. Likewise, in *Kroll*, our Supreme Court found unconstitutional an instruction which provided that when a homicide is proven beyond a reasonable doubt, there is a presumption of second-degree murder and that it is incumbent upon the defendant to show the homicide to be manslaughter. Under this instruction the *Kroll* court said at page 840:

> [T]he State is not required to prove every element of second-degree murder; it need only prove beyond a reasonable doubt the killing of one human being by another. No reference is made in the instruction to the fact that second-degree murder statutorily involves the element of intent. If the defendant is to reduce the crime to manslaughter, *however, he has the burden of creating a reasonable doubt as to the absence of intent.* Such a shifting of the burdens of proof clearly violates the concept of due process . . .

(Italics ours.)

Finally, in *Roberts*, the court, in addition to striking an instruction requiring the defendant to prove justification in order to reduce the degree of homicide, held unconstitutional the giving of a self–defense instruction which placed the burden of proving self–defense on the defendant. The self–defense instruction read:

> When a defendant claims that he killed another in self–defense of his own person or property, the burden is upon that defendant to prove that the homicide was done in self–defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof if, from a consideration of all the evidence in the case you have reasonable doubt as to whether or not the killing was done in self–defense.

After discussing *Mullaney* and *Kroll*, *Roberts* said of this instruction:

> *The self–defense instruction presently before us places precisely the same burden upon the defendant as to the element of absence of justification.* In view of the decisions in *Mullaney* and *Kroll*, *it is now only permissible to place upon the defendant the obligation to produce evidence, from whatever source, tending to establish self–defense.* The obligation to prove the absence of self–defense must remain at all times with the prosecution.

(Italics ours.) *State v. Roberts*, *supra* at 345.

[1, 2] We do not find the *Mullaney–Kroll–Roberts* trilogy applicable to the alibi defense or the instruction questioned by Mr. Johnson. While the identity of the defendant and his presence at the scene of the crime must be proven beyond a reasonable doubt, they are different than the elements discussed in *Mullaney* (justification), *Kroll* (intent), and *Roberts* (justification) which were presumed to follow from certain proven facts. In those instances the defendants were forced to negate the presumed facts in order to lessen the degree of the crime or to be acquitted. The identity and presence of the defendant are never presumed nor are they definitional elements of statutorily proscribed offenses.

Thus, we find no need to upset the *Adams-Kubicek* rule in light of later cases.[4]

Nor are we inclined to decide what standard of proof is required of a defendant asserting an alibi defense, as Mr. Johnson requests, because he is not required technically to *prove* his alibi. Instead, his burden really is to *produce* evidence tending to establish that defense and, in effect, to cast a doubt upon the prosecution's case. In the final analysis, the question is whether the evidence establishes beyond a reasonable doubt that the defendant committed the crime. That is the reason for confusion in the area of alibi defense and instructions.

> If the defendant raises an alibi, he is in effect denying the claim of the prosecution that he was at the scene of the crime at the time it was committed. He is neither expressly nor impliedly admitting the averments of the prosecution [as he would in the case of self-defense] and, therefore, need not set forth matter which would avoid the criminal liability that an admission would entail. Instead, by asserting that he was at another place at the time when the alleged crime was committed, the defendant is denying by necessary implication, if not expressly, the allegations set forth in the charge.
>
> . . .
>
> *There is some conflict as to the burden and degree of proof of the defense of alibi. Some of this conflict may undoubtedly be explained by a failure to recognize the distinction between the burden of proof and the burden of going forward with the evidence.* Because the burden of presenting evidence of a fact peculiarly within the

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[4]We note the Supreme Court has arguably retreated from the broad sweeps it made in *Mullaney*. In *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319, 2325 (1977), the court approved a state statute which required a defendant in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter. The court found the affirmative defense did "not serve to negative any facts of the crime which the State is to prove in order to convict for murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; . . ." The court noted that the death, the intent to kill and causation were the only facts the State was required to prove beyond a reasonable doubt in order to convict the defendant of murder under the New York statute.

defendant's knowledge may be placed upon him, it is proper to hold that the defendant must in the first instance go forward with evidence in support of his claim of alibi. *The matter is to a large degree academic because, in spite of variant forms of expression, it is generally held that the ultimate burden of proving the presence of the defendant at the scene of the crime at the time of its commission is upon the prosecution, rather than that the ultimate burden is upon the defendant to show that he was at another place. The defendant may succeed simply by raising a reasonable doubt of his presence at the scene of the crime at the time it was committed.*

(Citations omitted; italics ours.) 1 C. Torcia, *Wharton's Criminal Evidence* § 23, at 36–39 (13th ed. 1972). It is for those reasons that the courts in *Adams* and *Kubicek* directed that no alibi instruction be given. But as in *Adams* and *Kubicek* we find no reversible error in the giving of this instruction.

Judgment of the Superior Court is affirmed.[5]

MUNSON, C.J., and GREEN, J., concur.

Reconsideration denied April 5, 1978.

INSTRUCTION NO. 13

A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.

When the state makesout such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.

After both the state and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, it not, you should convict.

INSTRUCTION NO. 14

The burden is on he State of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt. It is not sufficient that the State should prove these facts by a mere preponderance of the evidence, nor, on the other hand, is it necessary that it should prove them conclusively in such a manner as to leave no room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty.

The expression "reasonable doubt" means in law just what the words imply - a doubt founded on some good reason. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt,

such as an honest, sensible and fairminded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

You must use your common sense as men and women of experience possessing some knowledge of wordly affairs, and if after examining carefully all the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of the guilt of a defendant, then you are satisfied of guilt beyond a reasonable doubt, and you verdict should be guilty as charged. On the other hand, if you do not have such a conviction then you have a reasonable doubt of guilt and your verdict should be not guilty.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON, Plaintiff,	CAUSE NO. 66747
v.	AFFIDAVIT OF DONALD W. SCHACHT
CURTIS LEE JOHNSON, Defendant.	

STATE OF WASHINGTON)
: ss.
COUNTY OF WALLA WALLA)

DONALD W. SCHACHT, being first duly sworn on oath, deposes and says:

That I was the trial attorney in the original trial in Walla Walla County, and one of the trial attorney in the subsequent retrials in Snohomish County; that an alibi instruction was requested by the Prosecuting Attorney in both cases; that I was not aware the Supreme Court had recommended that the alibi instruction not be given after the case of State v. Adams; that I became aware of that after the appeal was filed; that I never intended to

waive any constitutional or other objections to such instructions by not excepting to the same; that had I known there were issues to be taken on the alibi instruction, I would have made an exception to it.

/s/Donald W. Schacht

SUBSCRIBED AND SWORN to before me this ____ day of May, 1977.

/s/Karen R. Berg
Notary Public for State of Washington Resding at Walla Walla.